Ida Shafinaz bt Mohamed Kamil & Ors v Universiti Malaysia Sabah

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-12B-5/7 OF 2017
RAVINTHRAN PARAMAGURU J
6 SEPTEMBER 2018

Contract — Scholarship agreement — Breach — Respondent sued first appellant for breach of scholarship agreement — Whether sessions court judge erred in finding that first appellant required to successfully complete the course — Whether contra proferentum rule applicable — Whether scholarship agreement frustrated — Whether respondent's claim barred by equitable doctrines of laches and acquiescence — Whether respondent's claim statute barred

Limitation — Commencement of limitation period — Breach — Whether cause of action accrued with issuance of notice of demand — Whether there was clause in scholarship agreement that postponed limitation period — Whether there was fresh renewal of limitation period — Whether respondent's claim statute barred — Sabah Limitation Ordinance (Cap 72) s 19(1), items 94 & 95

This was an appeal in relation to a scholarship and study leave given to the first appellant by the respondent. The first appellant was a lecturer of the respondent and she was granted paid study leave of three years to pursue PhD degree from 21 November 2001–20 November 2004. At the same time, she was granted a scholarship and both parties signed a scholarship agreement ('the scholarship agreement'). The first appellant failed to complete her doctoral degree course within the stipulated time or the extended period. The first appellant duly resumed her service with the respondent in 2005 when her study leaves end. The respondent filed this instant suit in sessions court on 28 September 2016 and claimed for the sum of RM342,945.93 which consisted of study leave allowances, expenses and cost incurred which were paid to the first appellant or on her behalf, but not the salary paid during the study leave. The sessions court judge entered judgment for the respondent, hence this appeal. The grounds of appeal were, inter alia, as followed: (a) the sessions court erred in holding that the scholarship agreement stipulated that the first appellant was required to successfully complete the course; or alternatively, the sessions court failed to apply the contra proferentum rule; (b) the sessions court judge failed to find that the scholarship agreement was frustrated because the second supervisor, Ms Colston, did not want to make comments on the draft thesis of the first appellant; (c) the sessions court judge failed to make a finding on acquiescence in favour of the first appellant as the respondent failed to notify her that she breached the agreement when she re-joined service in 2005;

and (d) the sessions judge erred in holding that the claim was not barred by limitation law. A

Held, allowing the appeal with costs of RM3,500 here and below subject to allocator fee:

B

(1) Based on cl 1(a) and (h) of the scholarship agreement, the first appellant was obliged to complete the doctoral course successfully by being conferred the PhD degree within the prescribed time. Since the said clauses were clear, categorical and unambiguous, there was no reason to invoke the contra proferentum rule of construction against the respondent (see paras 13–16). C

(2) There was no merit in the second ground of appeal. The learned sessions court judge found that the claim of the first appellant that Ms Colston refused to comment on the draft thesis or supervise her work was untrue. She found that Ms Colston had in fact commented on the draft thesis of the first appellant as stated in the letter dated 16 September 2004. She also considered the progress report attached to the said letter which showed that Miss Colston had supervised the work of the first appellant. It was apparent that she rejected the evidence of the first appellant in view of the letters from Ms Colston. As it was not demonstrated that the trial judge erred in principle in rejecting the evidence of the first appellant, her finding of fact did not warrant interference by the appellate court (see para 19). D E

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(3) The learned sessions court judge was wrong to look at the date of the issuance of the notice of demand and termination in 2016 to determine the time of the commencement of the limitation period. The limitation period under items 94 and 95 of the schedule to the Sabah Limitation Ordinance (Cap 72) ('the Ordinance') runs from the time 'when the contract is broken'. In the present case, the contract was broken when the first appellant returned without being conferred the PhD degree after the extended leave of three years and six months. Thus, the six year limitation period started to run in 2005. Further, there was no clause in the scholarship agreement that postponed the limitation period in item 95 of the Ordinance, thus this instant claim was statue barred (see paras 31 & 40). G H

(4) On 1 October 2014, the first appellant wrote to the respondent acknowledging liability and pleaded that no action to be taken against her. Section 19(1) of the Ordinance enacted in clear words that acknowledgment of liability must be made before the expiry of the limitation period. Hence, the said letter could not revive a limitation period that had already expired (see paras 43–44). I

(5) The respondent did not give any indication of terminating the agreement, thus it would be plainly inequitable for the respondent who had for no good reason slept on its rights for 11 years to insist on full payment of all monies expended on the first appellant (see para 46).

[Bahasa Malaysia summary

Ini adalah rayuan berkenaan dengan biasiswa dan cuti belajar yang diberikan kepada perayu pertama oleh responden. Perayu pertama adalah pensyarah responden dan beliau telah diberikan cuti belajar berbayar selama tiga tahun untuk melanjutkan pengajian ijazah PhD dari 21 November 2001–20 November 2004. Pada masa yang sama, beliau telah mendapat biasiswa dan kedua-dua pihak menandatangani perjanjian biasiswa ('perjanjian biasiswa tersebut'). Perayu pertama telah gagal menamatkan kursus ijazah kedoktorannya dalam masa yang ditetapkan atau tempoh lanjutan. Perayu pertama menyambung semula khidmatnya dengan responden pada tahun 2005 apabila cuti belajar beliau tamat. Responden memfailkan tuntutan ini di mahkamah sesyen pada 28 September 2016 dan menuntut sejumlah RM342,945.93 yang terdiri daripada elaun cuti belajar, perbelanjaan dan kos yang dibelanjakan yang dibayar kepada perayu pertama atau bagi pihaknya, tetapi bukan gaji yang dibayar semasa cuti belajar. Hakim sesyen telah memberikan penghakiman bagi responden, maka rayuan ini. Alasan rayuan adalah, antara lain, seperti yang berikut: (a) mahkamah sesyen telah terkhilaf apabila memutuskan bahawa perjanjian biasiswa tersebut menyatakan bahawa perayu pertama diperlukan untuk menyelesaikan kursus ini; atau secara alternatif, mahkamah sesyen telah terkhilaf untuk menerapkan prinsip contra proferentum; (b) hakim sesyen telah terkhilaf apabila mendapati perjanjian biasiswa tersebut tidak dapat dilaksanakan kerana penyelia kedua, Cik Colston, tidak ingin memberi komen terhadap cadangan tesis perayu pertama; (c) hakim sesyen telah terkhilaf apabila membuat dapatan atas persetujuan yang memihak kepada perayu pertama apabila responden telah gagal memberikan notis kepada beliau bahawa beliau telah melanggar perjanjian ketika dia kembali berkhidmat pada tahun 2005; dan (d) hakim sesyen telah terkhilaf apabila membuat dapatan bahawa tuntutan itu tidak terhalang oleh undang-undang had masa.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM3,500 tertakluk kepada fi alokatur:

(1) Berdasarkan kepada klausa 1(a) dan (h) perjanjian biasiswa, perayu pertama diwajibkan untuk menyelesaikan kursus ijazah kedoktoran dengan jayanya dengan diberikan ijazah PhD dalam masa yang ditetapkan. Oleh kerana fasal-fasal tersebut jelas, berkategori dan tidak samar, tidak ada alasan untuk menggunapakai prinsip konstruk contra proferentum terhadap responden (lihat perenggan 13–16).

(2) Tidak ada merit pada alasan kedua rayuan. Hakim sesyen yang bijaksana

telah membuat dapatan bahawa dakwaan perayu pertama yang Cik Colston enggan mengulas mengenai cadangan tesis atau menjadi penyelia hasil kerja beliau adalah tidak benar. Beliau telah mendapati bahawa Cik Colston sebenarnya telah mengulas mengenai cadangan tesis perayu pertama seperti yang dinyatakan dalam surat bertarikh 16 September 2004. Beliau juga telah mengambilkira laporan kemajuan yang dilampirkan pada surat tersebut yang menunjukkan bahawa Cik Colston telah menyelia kerja perayu pertama. Adalah jelas bahawa dia menolak keterangan perayu yang pertama memandangkan surat dari Cik Colston. Oleh kerana ianya tidak menunjukkan bahawa hakim perbicaraan telah terkhilaf secara prinsipnya dalam menolak keterangan perayu pertama, dapatan fakta tidak menjamin campur tangan oleh mahkamah rayuan (lihat perenggan 19).

(3) Hakim perbicaraan yang bijaksana telah terkhilaf apabila melihat tarikh pengeluaran notis tuntutan dan penamatan pada 2016 untuk menentukan permulaan tempoh had masa. Tempoh had masa di bawah perkara 94 dan 95 jadual Ordinan Had Sabah (Cap 72) ('Ordinan tersebut') bermula dari masa 'apabila kontrak dilanggar'. Dalam kes ini, kontrak tersebut dilanggar apabila perayu pertama kembali tanpa diberikan ijazah PhD selepas cuti yang dilanjutkan tiga tahun dan enam bulan. Oleh itu, tempoh had enam tahun bermula pada tahun 2005. Tambahan pula, tidak ada klausa dalam perjanjian biasiswa yang menangguhkan tempoh had dalam perkara 95 Ordinan tersebut, oleh tuntutan dihalang oleh had masa (lihat perenggan 31 & 40).

(4) Pada 1 Oktober 2014, perayu pertama menulis kepada responden mengakui liabiliti dan merayu tidak ada tindakan akan diambil terhadapnya. Seksyen 19(1) Ordinan memperuntukkan dengan jelas pengakuan liabiliti mestilah dibuat sebelum tempoh had masa tamat. Oleh itu, surat tersebut tidak dapat memulihkan tempoh had yang telah luput (lihat perenggan 43–44).

(5) Responden tidak memberikan sebarang indikasi untuk menamatkan perjanjian, oleh itu ia adalah jelas tidak adil bagi responden yang tidak mempunyai alasan yang kukuh untuk tidur terhadap haknya selama 11 tahun untuk menuntut pembayaran penuh semua wang yang dibelanjakan pada perayu pertama (lihat perenggan 46).]

Notes

For cases on breach, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7338–7339.

For cases on commencement of limitation period in general, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2455–2456.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Mygal bin Gibie & Anor [2004] 4 MLJ 12, HC (refd)
Insun Development Sdn Bhd v Azali bin Bakar [1996] 2 MLJ 188, FC (refd)
Loh Wai Lian v Sea Housing Corporation Sdn Bhd [1987] 2 MLJ 1, PC (refd)
The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak [2014] 6 MLJ 153, FC (refd)
Trengganu State Economic Development Corporation v Nadefinco Ltd [1982] 1 MLJ 365 (refd)
Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182, FC (refd)

Legislation referred to

Contracts Act 1950 ss 29, 57(2)
Sabah Limitation Ordinance (Cap 72) s 19, 19(1), Schedule, items 94, 95
Universities and University Colleges Act 1971

Gaanesh (Gaanesh & Co) for the appellants.
Dixon Loi (Jayasuriya Kah & Co) for the respondent.

Ravinthran Paramaguru J:

INTRODUCTION

[1] This is an appeal from the decision of the sessions court after a full trial. The appellants were sued by the respondent in relation to a scholarship and study leave given to the first appellant. The other appellants were the guarantors. The sessions court entered judgment for the respondent in the sum of RM342,945.93 as prayed and hence the instant appeal by all the appellants.

BRIEF FACTS

[2] The respondent, University Malaysia Sabah or UMS is a university established under the Universities and University Colleges Act 1971. The first appellant is lecturer in the business and accounting faculty of the respondent. She was granted paid study leave of three years from 21 November 2001–20 November 2004 to pursue a Doctor of Philosophy degree ('PhD degree') in Commercial Law at the University of Strathclyde, United Kingdom. At the same time, she was also granted a scholarship under the 'Skim Latihan Akademik Bumiputera (SLAB)'. The agreement that the parties signed in this case is called the 'Perjanjian Hadiah Biasiswa Latihan Kakitangan Universiti Malaysia Sabah'. In this judgment, I shall refer to it as the 'scholarship agreement'. The case of the respondent is that the first appellant breached the scholarship agreement by failing to complete her doctoral degree course within the stipulated period of three years or the extended period of

three years and six months. The scholarship agreement also provided for an extension of six months which was availed by the first appellant in this case.

[3] The respondent is now claiming the sum of RM342,945.93 which consists of 'study leave allowances, expenses and costs incurred which were paid to the first appellant or on her behalf'. The respondent is not claiming the salary paid to the first appellant during her study leave.

[4] The first appellant did not dispute that she failed to obtain the PhD degree. She gave some reasons at the trial why she was unable to her complete her studies. Her PhD supervisor was one Professor Lloyd. He was frequently on sick leave and went on sabbatical leave when she was in her final year. The replacement supervisor, one Miss Colston was reluctant to comment on the first appellant's thesis. The first appellant reverted to Professor Lloyd but he declined to review her draft thesis. The first appellant was then asked to resume her service with the respondent as her study leave had ended. The first appellant duly rejoined the service of the respondent in 2005 but the instant suit was only filed on 28 September 2016.

[5] The first appellant also argued during the trial that she was not obliged to successfully complete the course and therefore her failure to obtain the PhD degree is not a valid ground for termination of the scholarship agreement.

[6] Thus, to sum up, the defence of the first appellant is that the scholarship agreement was frustrated, that it was terminated without a valid ground and that in any event it is barred by limitation law and the doctrines of acquiescence as well as laches.

DECISION OF THE SESSIONS COURT

[7] On the issue of frustration, the learned sessions court judge found as follows. She considered the evidence of the plaintiff who exhibited letters and reports prepared by Miss Colston who is the second supervisor of the first appellant. She found that the first appellant had managed to consult Miss Colston frequently from 28 May 2004 onwards. She also found that Miss Colston had made comments on the first appellant's progress in her thesis. Miss Colston had even written a letter to the registrar of the university to comment on the expected date of completion of the first appellant's studies. Thus, she rejected the defence that Miss Colston who was the second supervisor did not comment on her draft thesis and therefore the scholarship agreement was frustrated.

[8] She also rejected the defence that the first appellant was not obliged to successfully complete her doctoral studies by obtaining the PhD degree. She

referred to the scholarship agreement and found that the first appellant was to complete (*sempurna*) the course successfully (*capai kejayaan*) within three years.

[9] On the issue of limitation, the learned sessions court judge noted that the scholarship agreement was terminated by a 'Notice of Demand and Termination' dated 8 June 2016. Since the first appellant did not pay the sum demanded within 60 days from the date of the said notice, she found that the cause of action accrued on 7 August 2016.

[10] In respect of the issue of acquiescence and laches, the learned sessions court judge did not discuss it in her written judgment and thus made no finding on it although it was addressed in the submissions.

GROUNDS OF APPEAL

[11] The grounds of appeal in summary are as follows:

(a) the sessions court judge erred in holding that the scholarship agreement stipulated that the first appellant is required to successfully complete the course. In the alternative, the sessions court failed to apply the contra proferentem rule;

(b) the sessions court judge failed to find that the scholarship agreement is frustrated;

(c) the sessions court judge failed to make a finding on acquiescence in favour of the first appellant as the respondent failed to notify her that she breached the agreement when she rejoined service in 2005;

(d) the sessions court judge erred in holding that the claim was not barred by limitation law; and

(e) the sessions court erred in holding that the respondent had proved the loss in question.

WHETHER THE FIRST APPELLANT OBLIGED TO OBTAIN PhD DEGREE?

[12] Counsel for the appellants submitted that the scholarship agreement did not stipulate that the first appellant ought to be conferred the PhD degree at the end of the three-year study leave by the University of Strathclyde. Therefore, he argued that the first appellant did not breach the scholarship agreement although she failed to obtain the PhD degree.

[13] I agree with the learned sessions court judge that there is no merit in this ground of appeal. The scholarship agreement is written in the Malay language.

Clause 1(a) says as follows:

> PELAJAR dengan ini berjanji, bersetuju dan mengakui bahawa dalam masa tempoh kursus/pengajian PELAJAR akan:
>
> (a) Memasuki, mengikuti dengan bersungguh-sungguh, meneruskan dan menyempurnakan kursus latihan/pengajian yang dikehendaki ... dalam tempoh masa yang ditetapkan ...

[14] The above-mentioned provision required the first appellant not only to 'undertake the course' but to successfully complete it (*menyempurnakan kursus*) within the prescribed time. Furthermore, cl 1(h) states as follows in part:

> ... PELAJAR ... hendaklah menunjuk dan mencapai kejayaan yang memuaskan di dalam pengajiannya.

[15] The above provision clearly stipulates that the first appellant has not only undertaken to merely undergo the doctoral course but that she is obliged to achieve success in her studies. Other clauses in the scholarship agreement provide for the first appellant to apply for extension of time to complete the course. As stated in the Federal Court case of *Trengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365 which was cited by counsel for the respondent, in interpreting an expression in a contract, it must considered in the light of other words appearing in the context in which it is used and all other clauses relating thereto.

[16] If the argument of counsel for the appellants that the first appellant was not obliged to successfully complete the course by earning the PhD degree but was merely required to attend a three-year doctoral course is correct, the clause in the scholarship agreement which stipulated that she is obliged to succeed in her studies and the clause for extension of time would be redundant. For the above reasons, my reading of the above-mentioned clauses is that the first appellant was obliged to complete the doctoral course successfully by being conferred the PhD degree within the prescribed time. Since the said clauses are clear, categorical and unambiguous, I see no reason to invoke the contra proferentum rule of construction against the respondent.

FRUSTRATION

[17] The second ground is that the scholarship agreement was frustrated because the second supervisor did not want to make comments on the draft thesis of the first appellant. I see no merit in this ground of appeal for the following reasons.

[18] The common law doctrine of frustration is reenacted in s 57(2) of the Contracts Act 1950. It reads as follows:

(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[19] The learned sessions court judge referred to the letters that passed between the registrar of the university, the second supervisor and the first appellant and found that the allegation had no basis in fact. She found that the claim of the first appellant that Miss Colston refused to comment on the draft thesis or supervise her work was untrue. She found that Miss Colston had in fact commented on the draft thesis of the first appellant as stated in the letter dated 16 September 2004. She also considered the progress report attached to the said letter. It shows that the Miss Colston had supervised the work of the first appellant. The learned sessions court judge also considered the evidence of the first appellant that Miss Colston was reluctant to supervise her work and she had to refer to her first supervisor who again refused to comment on her draft thesis. It is apparent that she rejected the evidence of the first appellant in view of the letters from Miss Colston that was tendered into evidence. In my view, as it is not demonstrated that the trial judge erred in principle in rejecting the evidence of the first appellant, her finding of fact does not warrant interference by the appellate court.

LIMITATION

[20] The first appellant was asked to rejoin the service of the respondent on 12 December 2005 and continue in her post as a lecturer. By that time, she had completed her three-year doctoral studies although she failed to obtain the PhD degree. However, the respondent did not terminate the scholarship agreement when the first appellant was recalled to work. Neither did the respondent ask her to pay back the monies allegedly expended on her for the doctoral course in the United Kingdom under the terms of the scholarship agreement in question.

[21] The respondent sued the appellants only in September of 2016. Prior to the issuance of the writ, the respondent issued a notice of demand and termination dated 8 June 2016. Thus, the notice of demand and termination letter were issued more than 11 years after the first appellant failed to obtained the PhD degree.

[22] The appellants pleaded that the claim was barred by the Sabah Limitation Ordinance (Cap 72). Counsel for the appellants submitted that under item 95 of Schedule to the Ordinance, a suit for compensation for breach of contract in writing has to be instituted within six years from the time the contract is broken. Item 95 provides that 'the period of limitation would begin to run against a suit brought on a similar contract not in writing'. Thus,

item 95 must be read with item 94 which concerns a contract not in writing.

[23] Items 94 and 95 read as follows:

	Description of Suit		Time from which period begins to run
94	For compensation for the breach of any contract, express or implied, not in writing and not herein specially provided for.	Three Years.	When the contract is broken or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases.
95	For compensation for the breach of a contract in writing.	Six Years.	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.

[24] In the instant case, there is no question of successive breaches. In any event, counsel for the respondent did not argue to that effect. Thus, the only crucial issue in respect of limitation law is the commencement of the limitation period. On this issue, the parties differ.

WHEN LIMITATION PERIOD STARTS TO RUN?

[25] The learned sessions court judge accepted the argument of counsel for the respondent that the limitation period had not expired in the instant case. However, she did not discuss when the limitation period started to run in the context of item 95 of the Sabah Limitation Ordinance (Cap 72). Instead, she agreed with counsel for the respondent that the limitation period ran from the date of issuance of the first notice of demand which is dated 21 November 2012. This notice of demand was issued by the respondent and not their solicitors. However, the respondent did not issue a letter of termination. The sessions court judge said that limitation period would only expire on 21 February 2019 with regard to this notice of demand. The solicitors of the respondent issued a second notice of demand dated 8 August 2016. This notice of demand is curiously termed as notice of demand and termination. In the said letter, a demand for payment is made and then it purports to terminate (*penamatan*) the scholarship agreement. The learned sessions court judge ruled that the limitation period would only expire on 7 August 2022 with regard to this notice of demand and termination.

[26] The argument of counsel for the respondent was as follows. He submitted that the cause of action 'accrued' only on 8 August 2016 which is the date of the notice of demand that also purportedly terminated the scholarship agreement. The first appellant had 60 days to pay up the sum expended on her and therefore the respondent had six years and 60 days from the date of the notice of demand to institute the suit in question.

[27] Counsel for the respondent conceded in his written submission that for a claim arising from breach of a written contract, the limitation period would run upon breach of the contract under item 95 of the Sabah Limitation Ordinance (Cap 72). However, he submitted that contracting parties can postpone the date of accrual of the cause of action. He cited three cases in support, ie *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188, *The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153 and *Loh Wai Lian v Sea Housing Corporation Sdn Bhd* [1987] 2 MLJ 1.

[28] Counsel for the respondent argued that the first appellant and the respondent had postponed the date of accrual of the cause of action because of cl 8(iv) of the scholarship agreement which reads as follows:

> Adalah diisytiharkan dan dipersetujui lagi bahawa jikalau Perjanjian ini ditamatkan oleh pihak UNIVERSITI mengikut Fasal 5 atau 6 atau jika PELAJAR:
>
> (iv) meletak jawatan untuk apa sebab sekalipun ingkar, atau oleh sebab keburukan kelakuannya menjadikan dirinya tidak sesuai untuk berkhidmat atau terus berkhidmat dengan UNIVERSITI maka dalam mana-mana hal yang demikian ini UNIVERSITI boleh menurut budibicara mutlaknya *menamatkan Perjanjian ini dan dengan itu PELAJAR dan PENJAMIN-PENJAMIN hendaklah bersama-sama dan masing-masing bertanggungjawab* bagi pihak mereka, waris-waris, wasi-wasi, penerima-penerima serahakmereka, membayar kepada UNIVERSITI apabila diminta dalam tempoh enam puluh (60) hari wang sebanyak Ringgit Malaysia SATU RATUS DUA PULUH RIBU SAHAJA (RM120,000.00) atau semua wang yang telah dibayar kepada PELAJAR atau bagi pihaknya secara gaji, elaun-elaun atau sebaliknya dan semua wang yang telah dibelanjakan atau tanggungannya telah diterima oleh UNIVERSITI secara yuran, tambang, dan lain-lain bersangkutan dengan atau disebabkan oleh Perjanjian ini megikut yang mana lebih banyak. (Emphasis added.)

[29] Counsel for the respondent submitted that in accordance with cl 8, the respondent terminated the scholarship agreement on 8 June 2016. The letter of demand and termination refers to cll 8 and 9 of the scholarship agreement. Therefore, he submitted that respondent is only entitled to sue if payment is not made within 60 of the said date. Therefore, the limitation period would only expire on 7 August 2022. Alternatively, if the first notice of demand dated 23 November 2012 is considered, he submitted that the claim would be barred

by limitation law only on 22 January 2019. A

[30] In my opinion, the learned sessions court judge had seriously misdirected herself in law in respect of the commencement of the limitation period by accepting the above argument of counsel for the respondent. Item 94 read together with item 95 stipulates that the limitation period is six years for breach of a written contract. Parties are on common ground that the item 95 applies to this case. However, item 95 clearly provides that the limitation period runs from the time of the breach of the contract. In the instant case, the basis of the cause of action is that the first appellant had breached the contract by not being conferred the PhD degree within the stipulated period of three years or the extended period of three years and six months. This stipulated period expired in 2005 and the first appellant was asked to rejoin the service of the respondent without any conditions. Therefore, it is patently clear that the breach of the scholarship agreement occurred in 2005 when the first appellant returned to the service of the first respondent after spending three years and six months in the United Kingdom without being conferred the PhD degree. B C D

[31] For the above reasons, the learned sessions court judge was wrong to look at the date of the issuance of the notice of demand and termination in 2016 to determine the time of the commencement of the limitation period. The limitation period under item 94 and 95 runs from the time 'when the contract is broken' as stated in the third column of the schedule to the Sabah Limitation Ordinance (Cap 72). Obviously, in the instant case, the contract was broken when the first appellant returned without being conferred the PhD degree after the extended study leave of three years and six months. Thus, as correctly pointed out by counsel for the appellants, the six year limitation period started to run in 2005. E F

[32] Counsel for the respondent agreed that ordinarily, the limitation period runs from the time the contract is broken. But he to argued that commencement of the limitation period has been postponed by mutual agreement because of cl 8(iv) that I reproduced above. To my mind, reliance on cl 8(iv) is unhelpful as there is nothing in the provision that faintly suggests that the contracting parties had agreed to postpone the limitation period. G H

[33] Instead, the said clause stipulates that the respondent can terminate the contract if the first appellant resigns from service, or is insubordinate or is of bad character or is deemed unsuited to continue in service. Therefore, nothing in this clause entitles the respondent to terminate the scholarship on account of the failure on the part of the first appellant to complete the doctoral course successfully. And most importantly, for the purpose of the discussion at hand, there is nothing in this clause that postpones the commencement of the limitation period. I

[34] In the premises, the argument that the limitation period had been postponed by cl 8(iv) of the scholarship agreement is flawed. Nothing in the other sub-clauses of cl 8 state that the contracting parties had by mutual agreement postponed the commencement of the limitation period under the third column of the schedule to the Sabah Limitation Ordinance (Cap 72). There is nothing in cl 9 either that postpones the commencement of the limitation period.

[35] Counsel for the respondent forcefully argued that the respondent can only sue after the issuance of the notice of termination and the notice of demand. It may well be so. That would mean that the respondent cannot sue without issuing a notice of termination as in the case of a demand guarantee. But as I said earlier nothing in any of the clauses of the entire scholarship agreement can be read as postponing the commencement of the limitation period. If the respondent had issued the notice of termination within the limitation period of six years that started to run in 2005, they would have been able to institute legal action without running afoul of limitation law. However, they waited for 11 years without taking any action.

[36] The three cases in question cited by counsel for the respondent can be easily distinguished. In those cases, there were clear provisions in the agreement that postponed the commencement of the limitation period.

[37] In *Loh Wai Lian v Sea Housing Corporation Sdn Bhd*, which concerned a construction contract, the vendor failed to complete the building within 18 months which is on 18 September 1975. It was completed only on 7 November 1977. The purchaser sued the vendor only in September 1982. The decisions of the High Court and the Federal Court that the claim for liquidated ascertained damages ('LAD') was barred by limitation law was overturned by the Privy Council. The reason was that cl 17 provided that the sum claimed by the purchaser did not become due until it is ascertained. His Lordships also said as follows:

> ... parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided.

[38] In *Insun Development Sdn Bhd v Azali Bin Bakar*, the facts were more or less similar. The developer was obliged under cl 18 to deliver the completed house within 24 months from the date of the sale and purchase agreement. The purchaser commenced an action for LAD more than six years after the date stipulated in cl 18. The Federal Court held that 'it is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract but the parties to

a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages'. However, in that case, the Federal Court ruled that the general principle applied as cl 18 provided the opening date but not the closing date for the calculation of LAD. The Federal Court distinguished *Loh Wai Lian v Sea Housing Corporation Sdn Bhd* and held that the claim was barred by limitation law.

[39] In *The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak*, the cause of action was based on a guarantee agreement. The guarantee in question required all claims to be made during the one year guarantee period. The main issue in that case was whether s 29 of the Contracts Act 1950 applied. However, in relation to postponement of a cause of action by agreement, the Federal Court said that 'should a guarantee prescribe that a certain event must happen before a cause of action accrues, for example, the making of a prior demand, then that has to be complied with before a cause of action can arise and a right to sue accrues'.

[40] However, it must be noted that none of the above mentioned cases are on point in relation to the scholarship agreement in question. There is no clause in the scholarship that postpones the limitation period prescribed in item 95 of the Sabah Limitation Ordinance (Cap 72). For all the above reasons, I am of the view that the instant claim is barred by the Sabah Limitation Ordinance (Cap 72).

WHETHER THERE WAS FRESH RENEWAL OF THE LIMITATION PERIOD?

[41] Section 19 (shorn of the explanations) of the Sabah Limitation Ordinance (Cap 72) reads as follows:

> 19(1) If before the expiration of the period prescribed for a suit in respect of any property or right an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgement was so signed.
>
> (2) When the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

[42] This provision enacts that if there is a written acknowledgment of the liability in question before the expiry of the specified limitation period, a fresh limitation shall run from the time of the said acknowledgement.

[43] In the instant case, the learned sessions court judge accepted the argument of the respondent that s 19(1) of the Sabah Limitation Ordinance (Cap 72) operated to create a fresh limitation period. The reason is this. On 1 October 2014, the first appellant wrote to the respondent. In the said letter, she acknowledged liability and pleaded that no action be taken against her as she is now pursuing a PhD degree at a local university. The learned sessions court judge held that the limitation period ran afresh from 1 October 2014.

[44] In my opinion, the learned sessions court judge erred in holding that s 19(1) applied by virtue of the said letter. Section 19(1) enacts in clear words that acknowledgement of liability must be made *before* the expiry of the limitation period. In the instant case, the limitation period commenced in 2005 and had long expired before the said letter was written in 2014. In the premises, the said letter cannot revive a limitation period that had already expired (see *Borneo Housing Mortgage Finance Bhd v Mygal bin Gibie & Anor* [2004] 4 MLJ 12).

LACHES AND ACQUIESCENCE

[45] Counsel for the appellants had submitted that the claim is barred by equitable doctrines of laches and acquiescence. In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182, Hashim Yeop Sani at the High Court explained the equitable doctrine of laches as follows:

> To set out the general principles first, it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, ie where the plaintiff has slept upon his right and acquiesced for a great length of time. For 'laches' literally means negligent inactivity. He is then said to be barred by his laches. (*Halsbury*'s 3rd Ed, Vol 14, p 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part.

[46] In the instant case, the respondent invited the first appellant to rejoin its service as a lecturer for 11 years before terminating the scholarship agreement and demanding all the monies expended on her. It can be fairly said that in those 11 years, the first appellant would not have saved money to pay the respondent or made arrangements to seek employment elsewhere to augment her income in anticipation of being sued so many years later. And the reason is simple. The respondent did not give any indication of terminating the agreement and demanding the sum of over RM300,000 during those years. I am of the view that by allowing the first appellant to work for more than 11 years without intimating that she would be sued for breach of contract, the respondent had caused her to alter her position. Thus, it would be plainly inequitable for the respondent to insist upon full payment of all the monies

expended on her. She would have to drastically rearrange her financial affairs to come up with the big sum of money demanded by respondent who had for no good reason slept on its rights for 11 years. In the premises, on the above ground as well, the appeal should be allowed.

CONCLUSION

[47] For all the above reasons, I shall allow the appeal with costs of RM3,500 here and below subject to allocatur fee.

Appeal allowed with costs of RM3,500 here and below subject to allocator fee.

Reported by Ling Wan Teng